OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 95-15 August 22, 1995

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Fred Feinstein, General Counsel

SUBJECT: Lightening the Regional Office Workload

In my September 8, 1994 memorandum, which discussed priorities and the expanded delegation of authority to the Regional Directors in a number of areas, a pledge was made to continue the assessment of the outcome of the priorities and our exploration of additional ways in which we might reduce the burden on Regional Office staffs. In the months since the priorities were implemented, we have repeatedly heard from field managers that there is simply too much work to perform with our available resources. During my visits to a number of Regions, supervisors, managers and employees at all levels have reiterated their belief that we are unable to handle all cases as we have in the past. Most recently, I heard from a number of you at our Regional Directors Conference regarding the need for a continuing effort on our part to reduce the increasingly large workload burdens on our Regional Offices staff. It is increasingly apparent, that the Agency has insufficient resources to handle all cases quickly and well. In significant part, this conclusion lies at the foundation of the "Impact Analysis" approach to case prioritization and management.

Briefly stated, Impact Analysis provides for the differentiation of cases based on public impact. It is driven by a necessity to increase the Agency's effectiveness in the context of limited resources. The fundamental purpose of Impact Analysis is to ensure that those cases which require prompt resolution because of their public impact receive sufficient resources and the Agency's best efforts. Inevitably, under any prioritization approach some cases must wait longer for resolution than others. For example, under Impact Analysis, a Gissel investigation will command more resources and greater effort than an isolated independent 8(a)(1) allegation. Accordingly, under an Impact Analysis approach time targets will be liberalized and alternative investigative techniques, in lieu of face-to-face affidavits, employed for cases of lower priority. In the near future we plan to share with you the details of how Impact Analysis should be applied in the Regional Offices to reduce the burden on the staff while directing our limited resources to those cases which demand priority attention.

In the meantime, pending the implementation of the "Impact Analysis" approach, the fact remains that Regional staffs need immediate relief, to the extent we are able to provide it, to accommodate the increasing workload and complexity of cases. Additional staffing is not a realistic possibility at the present time and, in fact, the Agency will in all likelihood be faced with significant budgetary restrictions. Accordingly, we must turn inward, to the manner in which we do our work, in an attempt to decrease the workload. The purpose of this memorandum is to announce additional delegations and work saving techniques that are effective immediately. Many Regions have already utilized one or more of these techniques. Some of the resource savings realized under these initiatives may be modest; others may prove more significant. All are advanced with the expectation that in the aggregate, these modifications will result in some relief from the Regional workload. This, in turn, should permit for the Regions' continued dedication to the achievement of our priorities.

In announcing these changes, it is recognized that a number of the resource saving approaches discussed below are not without controversy. Unfortunately, the realities of our world include limited resources. We know from personal experience that other organizations providing critical public services such as hospitals, police, fire departments and the U. S. Attorney's office prioritize or "triage" their work to carefully determine how to best use precious resources. We cannot simply conclude we have too much work to perform without considering alternative approaches to the work that remains to be done. Our challenge is to ensure that every case is given appropriate consideration, while at the same time avoiding the unnecessary expenditure of our increasingly limited resources. During this period, it is essential that we maintain ongoing communications with our employees, so that employees clearly know what is expected of them. At the same time, managers and supervisors should be cognizant of the workload of employees in providing immediate relief in assigning, establishing deadlines and appraising work.

The approaches set forth below are essentially drawn from the recommendations of prior work groups and Regional committees including: the Long Range Planning Committee, the 1994 Regional Management Committees, the Priorities Committee and Impact Analysis Work Group. We have already reduced paperwork and expanded the delegation of authority to the Regional Directors through GC Memorandum 95-9, "Paperwork Reduction - Elimination or Modification of Submission/Clearance Requirements." In addition, in GC Memorandum 95-8, "Collection Cases," we have modified our procedures with respect to mid-term "benefits funds" cases in an effort to reduce the Region's

workload in this regard.[1] Accordingly, the primary emphasis of this memorandum will be on changes affecting the investigation and resolution of unfair labor practice charges.

1. THE USE OF INVESTIGATIVE ALTERNATIVES TO THE AFFIDAVIT IN SELECTED CASES:

The belief that our current and future resources will be inadequate to do everything as promptly and with the level of thoroughness to which we are accustomed drives the consideration of the use of alternative investigative techniques. Based upon the judgment that the Agency must focus its resources on those cases in which our actions are likely to have the greatest public impact, the following "guiding principles" are intended to assist the field offices in determining when use of the new techniques or standards would be appropriate.

Generally, alternative investigative techniques are most appropriately employed in no-merit cases and with potentially meritorious cases of limited, and frequently individual, impact, or where alternative means of resolution may exist and are available to the parties. These cases typically present less legally or factually complex issues than other cases. For example, such cases may include:

- Independent and isolated 8(a)(1) allegations, not in the context of an organizing campaign
- 8(b)(1)(A) failure to process grievance cases, where no related Section 8(a)(3) allegation has been filed
- Collyer/Dubo deferral cases
- 8(a)(5) pension and welfare contribution collection cases
- 8(a)(5)/8(b)(3) failure to provide information cases which do not affect the course of bargaining
- Isolated allegations of limited impact Section 8(a)(1) and (5) unilateral changes
- Section 8(a)(2) allegations involving limited assistance to an otherwise lawful employee committee

In addition, there may be other cases which lend themselves to alternative investigative techniques. These are cases in which the underlying facts are relatively straight-forward and not likely to be in dispute. For instance, certain

[1] I have recently decided that the current deferral policy for trust fund collection cases should also be applied to the failure to remit deducted union dues.

8(a)(5) or 8(b)(3) refusal to provide information cases might involve merely an exchange of correspondence. Thus, although a refusal to provide information case might warrant vigorous and expedited investigation, particularly if it were blocking a representation case, the evidence needed to establish the violation might not require affidavit testimony. Likewise, unilateral change allegations whose widespread impact might also be susceptible to resolution through more expedited procedures could be investigated using the techniques discussed below if the facts appeared to be uncontested. The Regional Office should exercise sound judgment in determining when and whether to use alternative investigative techniques, particularly in merit cases likely to proceed to litigation, given the potential adverse consequences of proceeding to litigation without the investigative cornerstone provided by affidavits. In no situation should we relegate control of the substance or pacing of our investigation to the parties. In sum, the nature of the allegation, the likelihood of merit and the relative complexity of the relevant facts, should guide the judgment about whether the following techniques are appropriate in individual cases.

A. Statement of Facts--Recording Charging Party's Evidence and Position in Non-Affidavit Form

One approach to efficiently handling the above-described investigations with a minimal amount of time and effort by the Board agent involves the preparation of a statement of facts from the charging party rather than a detailed affidavit. Under this procedure, the Board agent interviews the charging party over the phone, records the substance of the conversation in a summary form that is less comprehensive than a Board affidavit, and then sends the factual summary to the charging party for his/her review and invites the charging party to supplement the factual summary, if any of the information was either incorrect or incomplete. The statement of facts procedure is designed for cases that do not require a detailed, comprehensive affidavit and where it is unlikely that the Region will need to resolve credibility disputes in order to decide the merits of a case. This technique should only be employed in circumstances where the interview and preparation of facts would require less time than the preparation of an affidavit. Other techniques, such as the use of questionnaires, discussed below may also be considered. As with other decisions as to the course of the investigation, in making the determination as to the appropriateness of the use of a statement of facts in a particular case, Regional management and, in particular, the case supervisor, should consult with the Board agent, as appropriate.

For example, under this approach, a Board agent assigned a Section 8(b)(l)(A) case alleging a failure to process an individual's grievance, with the agreement of his or her supervisor, could contact a charging party over the

phone. In this phone call, the agent could question the charging party and record essential information about the charging party's claim in a summary of the facts. This summary of facts would contain such matters as the substance of charging party's grievance, a description of the events giving rise to the charging party's grievance, charging party's contacts with the union, any significant events concerning the union's handling of the grievance, what the union last told the charging party regarding the status of the grievance and any evidence that went to possible hostility by the union towards the charging party, such as charging party's membership status, involvement in internal union affairs or any other reasons why the charging party believes that the union is not assisting him/her. These facts would be recorded in a summary form without the detail and precision of a sworn affidavit. During or after the phone call, the agent would prepare a summary document memorializing the phone interview, and then send a letter to the charging party with a copy of the summary of facts, asking the charging party to review the summary and inviting him/her to supplement or correct the summary by a date certain. The final memorialization and summary would be placed in the file. The corrections or additions would normally be reflected in a file note. The agent then could proceed to gather any relevant evidence and/or position statements from the union and the employer. Thus, the statement of facts procedure would allow the investigation of such a low impact case to proceed with a minimal investment of Agency resources. However, as the statement of facts will typically be appropriately disclosable under Rule 102.118(b), the Regions should exercise appropriate judgment in utilizing this approach, particularly in potentially meritorious situations.

B. Requesting a Statement of Position from a Charging Party Where Facts are not in Dispute or Facts Are Set Forth in Documentary Form

In certain situations, the charging party's statement of position can be relied upon in lieu of taking an affidavit. This statement of position procedure is intended to be used primarily in cases where the facts are not in dispute or where the facts are set forth in documents that can be attached to the position statement.

For example, in a Section 8(a)(5) or 8(b)(3) failure to provide information case, a statement of position could be provided that attached the relevant correspondence between the parties regarding the requested information. Normally, the Region should utilize the statement of position procedure only where the case was filed by an institutional charging party, such as an employer or a union. Thus, for certain cases filed by an employer or a union, this procedure allows the investigation to be moved along quickly, with a minimal use of Board agent time. Moreover, it appears that with respect to cases where the facts are not substantially in dispute, a sworn affidavit is not needed in order to

resolve the merits of the case. However, prior to relying on a statement of position as the basis for a Regional determination, the Region should confirm that the material facts as set forth in the statement of position are not in dispute.

C. The Use of Questionnaires

A number of Regions have already successfully experimented with the use of pre-printed questionnaires in a limited number of cases. In accordance with the 1994 recommendation by Regional managers, questionnaires have been used to investigate selected allegations of refusal to provide information and unilateral changes. Copies of these questionnaires are attached as Attachment A and B of this memorandum. Regions are encouraged to utilize these as an investigative tool to assist in the development of pertinent facts during the processing of cases involving these allegations. In addition, during the Regional Directors Conference, a number of participants volunteered that their Regions had successfully utilized questionnaires in other circumstances, such as "salting cases" or the investigation of authorization cards relating to the appropriateness of a Gissel remedy. We would like to develop an inventory of the questionnaires successfully used by the Regions, so that all Regions can benefit from these efforts. Accordingly, within the next 2 weeks, please submit to your Assistant General Counsel, either by "E" mail attachment or floppy disk, copies of questionnaires successfully utilized by your Region. Also attached to this memorandum are two new questionnaires, both of which are intended to assist the Regions in processing individually filed allegations. The questionnaires, which are attached as Attachments C and D, were developed to facilitate the investigation of Section 8(a)(3) and 8(b)(1)(A) allegations, particularly in those situations where the IO has discouraged the charging party from filing what appears to be a clearly non-meritorious charge. The questionnaire is designed to elicit the charging party's version of the facts at the time the charge is filed. Specifically, the questionnaire is best utilized by sending it or handing it to the charging party at the same time the charge is prepared. The questionnaire should be returned at the same time the charge is filed. The questionnaire should assist in directing the course of the investigation, and in rare situations may obviate the need for further investigation. As issues of literacy, English fluency[2] and willingness to complete a narrative may affect the accurate completion of these questionnaires, caution should be exercised in relying upon these responses. Further, as the questionnaires will typically be appropriately disclosable under Rule 102.118(b), the Regions should exercise appropriate judgment in utilizing a questionnaire, reviewing the responses and relying on the questionnaire, particularly in potentially meritorious situations. Moreover, as is true for any Jencks material, the questionnaire should be retained even in

[2] We plan to translate these questionnaires into Spanish in the near future.

circumstances where the information is obtained in a better form, such as affidavit.

2. THE USE OF PROSECUTORIAL DISCRETION IN APPROPRIATE CASES

At present, when conduct engaged in by a charged party is found to be unlawful but either minor in character or resolved internally by the charged party, and the charging party will not withdraw the charge, the Regional Director must, generally, either issue complaint or require execution of a Board settlement agreement. Although the Regional Director may dismiss such a case on non-effectuation grounds, the General Counsel's standard for dismissal of a technically meritorious charge traditionally has been that the conduct is so minor and isolated that "it would not effectuate the purposes of the Act" to proceed further. Thus, in practice, the exercise of prosecutorial discretion has been very limited.

The Regional Director may also dismiss otherwise meritorious allegations in accordance with Passavant Memorial Area Hospital, 237 NLRB 138, 138 (1978), where the Board held that under certain circumstances a Respondent may effectively repudiate and cure a violation on its own such that no further remedial action is warranted. To be "effective," the repudiation must be timely, unambiguous, specific in nature to the coercive conduct and free from other proscribed illegal conduct. The repudiation must also grant assurances to employees that in the future the respondent will not interfere with their Section 7 rights.

While the Passavant standards represent the Board's "remedial discretion," i.e., the circumstances under which the Board will not order a remedy even though a violation is found to have occurred, the General Counsel is not bound to the same standards by virtue of Section 3(d) of the Act, e.g., "prosecutorial discretion." The exercise of General Counsel prosecutorial discretion up to the commencement of litigation is a principle supported by the Board and the Courts. There are situations involving meritorious allegations and private remedial actions which fall in between the Passavant standards and the current non-effectuation standard such that a more refined use of prosecutorial discretion may reduce the number of cases in which the Region must proceed formally to issue a complaint. That is, it may be appropriate in these cases to assess whether the Board remedy which would be obtained warrants the expenditure of Board resources to obtain it.

The cases for which such an approach would be appropriate are limited to those minor or technical violations in which there are no prior meritorious unfair labor practice charges within the past several years and in which:

a.) the conduct is isolated in nature; there is no ongoing unlawful effect on an employee's terms and conditions of employment; and, there is neither impact on other employees nor other accompanying violations which require a Board remedy

or

b.) the conduct has minor group impact, such as a delay in providing information 8(a)(5) violation where the delay caused no other adverse affect

or

c.) the conduct is of limited duration, such as an unlawfully promulgated no solicitation rule which was subsequently rescinded.

As is indicated above, typically in these situations, the unlawful conduct has ceased; or the charged party has taken, is taking or has agreed to take any affirmative actions necessary to remedy the conduct; and the only additional aspect of a remedy to be achieved is a notice.

While each case must be judged on its own facts, examples of cases meeting this description might include:

-Independent 8(a)(1) violations which are isolated

-8(a)(5) bargaining conduct cases in which the charged party has resumed, or is resuming, good faith bargaining, i.e., an employer who over a long period was dilatory and failing to meet over a successor agreement but has since met and agrees to keep meeting in good faith

-delay in providing information cases where the party has agreed, or is agreeing, to provide the information, and there has been no prejudice to the CP as a result of the delay and no history of prior like conduct

-technical 8(a)(2) assistance cases, such as providing campaign access to an incumbent union where the employer has admitted its error to all employees and granted equal access to the outside union

These cases can be resolved through the use of a "merit dismissal" in which the Director determines not to issue complaint because of the isolated

nature of the violation or to unilaterally approve a non-Board resolution of the allegations based upon a finding that the charged party's remedial actions have been sufficient under the circumstances and formal proceedings are not necessary. The resolution will frequently occur before the charge was filed, but will also include situations in which the resolution was post-charge, or even post-complaint if the impact of the violation is very minor and the remedial actions deemed effective. In this regard, the Region should review its existing trial calendar to determine whether these guidelines are applicable to individual cases presently scheduled for litigation.

Variations on the basic merit dismissal procedure should be considered as appropriate for the circumstances. Thus, if there is a need to make sure all employees are aware of the resolution, a condition of the dismissal could be the charged party's willingness to post a copy of the dismissal letter. The letter would state that sufficient evidence exists to warrant the issuance of a complaint, but explain the basis for determining not to proceed, e.g., what the charged party had done to cure the violation, together with assurances against further misconduct. An example might be a unionized employer who promulgates an overly broad no-solicitation rule which could interfere with the rights of employees to engage in internal union activities, but who has rescinded the rule and there is no evidence of actual enforcement against any employees. The posting of a dismissal letter in which it is explained that the employer's conduct, if proven, was unlawful but that it is not necessary to proceed further because the employer, in any event, has corrected and agreed not to repeat it would provide an adequate remedy. However, this procedure would not be used, for example, where the rule was promulgated in the context of an organizing drive. In the absence of an agreement to post the letters by the charged party, the Director may consider the fact that the charging party is able to publicize the dismissal letter, if it desires, in reaching a decision.

Similarly, the dismissal, by its terms, should be conditioned on no further ULPs for a 6-month period such that if the condition is violated, the dismissal could be rescinded. An example might be the 8(a)(5) dilatory bargaining situation described above in which the employer or union has been unlawfully dilatory in renewal contract negotiations by canceling and otherwise avoiding any bargaining sessions over a long period of time but has now begun to bargain and agrees to continue doing so. A dismissal could be conditioned on the party's assurances that it would not engage in any further unlawful bargaining conduct and provide that the dismissal would be rescinded if the condition were not satisfied. On the other hand, such a procedure would not be appropriate, for example, where the same violation occurs in connection with bargaining for an initial contract, in situations where a Mar-Jac remedy might be warranted or, where an employer has made unremedied unilateral changes.

In granting expanded authority to the Regional Directors, we recognize that differences in judgment may exist among Directors and between the Regions and the Office of Appeals, and that Directors must act without undue concern for being reversed on appeal. The same guidelines are applicable to both the Regions and to the Office of Appeals and we will be guided by the same principles in reviewing Regional investigations throughout the Office of the General Counsel. The same differences of opinion, however, may arise in this area as would arise in any case involving a Regional determination. The first several months under this program should be viewed as a time for experimentation and assessment of the expanded delegation. In this regard, in order for us to evaluate the effectiveness of this approach, we ask that you send copies of all merit dismissals you issue between this date and December 31, 1995 to Joyce Van Horn in Operations-Management.

We will continue to review and assess our work processes and requirements for the purpose of continuing to reduce the Regional workload, wherever possible. I welcome your suggestions in this regard.

F. F.

Attachments

cc: NLRBU